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In the Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL., PETITIONERS

v.

JOHNSON CONTROLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in a Title VII challenge to a gender-based fetal protection policy, the bona fide occupational qualification defense, rather than the business necessity defense, is the appropriate standard for analyzing an employer's defense of such a policy.

2. Whether the bona fide occupational qualification defense may justify an employer's use of a gender-based fetal protection policy.

3. Whether the court of appeals correctly applied the bona fide occupational qualification defense.

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INTEREST OF AMICI CURIAE

This case presents important questions concerning the meaning and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Both the Equal Employment Opportunity Commission (EEOC) and the Attorney General have significant enforcement responsibilities under the Act. The United States, as the nation's largest employer, is also subject to Title VII requirements.

STATEMENT

1. Since its purchase of Globe Union in 1978, respondent has been engaged in manufacturing batteries, a process which requires the use of lead as a primary ingredient. In 1977, in response to medical evidence of risks to unborn children, Globe Union adopted a fetal protection policy for lead exposure. Pet. App. 2a-5a. The policy statement noted that Globe Union had "stopped short of excluding women capable of bearing children from lead exposure," but it emphasized that "those women who

are working in lead exposure . . . and those women who wish to be considered for employment [should] be advised that there is risk, that we recommend *not* working in lead if they are considering a family, and further that we ask them to sign a statement that they have been advised of this risk." *Id.* at 5a.

Five years later, in 1982, respondent adopted the fetal protection policy at issue in this litigation; it shifted from a policy of warnings to a policy of exclusion.[1] Respondent announced its policy that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Pet. App. 9a. The policy defines women capable of bearing children as "[a]ll women except those whose inability to bear children is medically documented." *Id.* at 6a n.8. The policy further defines areas of lead exposure as areas in which (1) a current employee has recorded a blood level of lead exposure exceeding 30 micrograms per deciliter during the preceding year, or (2) the work site has yielded an air sample during the past year containing a lead level in excess of 30 micrograms per cubic meter. *Id.* at 5a. The policy permits employees in areas of lead exposure to keep their jobs if they are able to maintain certain blood lead levels (*id.* at 6a n.9); it contains no such option for new hires. Employees removed from a position because of excessive lead levels are transferred to another job without loss of pay or benefits (*id.* at 6a); the policy provides no similar compensation, however, for employees denied an opportunity to accept a job in a lead exposure environment.[2]

2. In April 1984, petitioners filed a class action challenging the fetal protection policy as sex discrimination in violation of

[1] Between 1979 and 1983, at least six of respondent's employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter, and one of the babies born to one of these employees was found to have an elevated blood lead level. Pet. App. 6a-7a.

[2] Respondent recently changed its policy in two respects. It eliminated the exclusion of fertile women from jobs which could lead to transfers to lead exposure jobs, and it lowered the level from 30 micrograms to 25 micrograms. Resp. Br. in Opp. 8 n.16. Both of these changes were adopted after the case was submitted to the court of appeals, and neither is in the record. *Ibid.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The district court certified a class consisting of past, present, and future production and maintenance employees in UAW bargaining units at nine of respondent's plants who have been and continue to be affected by respondent's fetal protection policy. Pet. App. 103a.

In January 1988, the district court granted respondent's motion for summary judgment. Applying a three-part business necessity defense derived from fetal protection cases in the Fourth and Eleventh Circuits, the court concluded that (1) although "there is a disagreement among the experts regarding the effect of lead on the fetus," the hazard to the fetus through exposure to lead was established by "a considerable body of opinion" (Pet. App. 113a-114a); (2) although "[e]xpert opinion has been provided which holds that lead also affects the reproductive abilities of men and women * * * [and] that these effects are as great as the effects of exposure of the fetus, * * * a great body of experts [is] of the opinion that the fetus is more vulnerable at levels of lead that would not affect adults" and "[m]en simply cannot expose a fetus to lead in the same way women can" (*id.* at 115a, 117a); and (3) petitioners had "failed to establish that there is an acceptable alternative policy which would protect the fetus." *Id.* at 116. The court also observed that, in view of this disposition of the business necessity defense, it did not "have to undertake a bona fide occupational qualification[ ] (BFOQ) analysis." *Id.* at 116a n.5.[3]

3. In September 1989, the Seventh Circuit affirmed in an en banc opinion.

a. The majority held that (1) the proper standard for evaluating the fetal protection policy was the business necessity defense; (2) respondent was entitled to summary judgment under the business necessity defense; and (3) even if the proper stan-

[3] The BFOQ defense provides, in pertinent part (42 U.S.C. 2000e-2(e)):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of [the employee's] religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

dard was a BFOQ, respondent was entitled to summary judgment. The court first reviewed the fetal protection opinions from the Fourth and Eleventh Circuits.[4] Those opinions established a three-step business necessity defense—whether there is a substantial health risk to the unborn child; whether transmission of the hazard to the unborn child occurs only through women; and whether there are no less discriminatory alternatives equally capable of preventing the health hazard to the fetus. Pet. App. 25a. The Seventh Circuit agreed that "the components of the business necessity defense the courts of appeals and EEOC have utilized in fetal protection cases balance the interests of the employer, the employee, and the unborn child in a manner consistent with Title VII." *Id.* at 27a-28a.[5] The court further noted that, under *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), the burden of persuasion always remains on the plaintiff in challenging a business necessity defense, and—unlike the Fourth and Eleventh Circuits—it thus imposed the burden on the plaintiffs for all three steps. Pet. App. 28a-31a. Cf. *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543, 1549 (11th Cir. 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172, 1187 (4th Cir. 1982).

[4] See *Hayes* v. *Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984); *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). In *Wright*, the court treated a fetal protection policy as a policy with disparate impact, even though it explicitly applied only to fertile women; in *Hayes*, the court treated a fetal protection policy as a policy of disparate treatment, but permitted a prima facie case of facial discrimination to be rebutted by the elements of the business necessity defense established in *Wright*.

[5] In October 1988, while this case was pending on appeal, EEOC issued a policy statement in which it stated that "[a]lthough the BFOQ defense is normally the only one available in cases of overt discrimination, the Commission follows the lead of every court of appeals to have addressed the question * * * and concluded that the business necessity defense applies to these cases." *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988) at 4, *reprinted in* Fair Empl. Prac. Manual (BNA) 405:6613, 6614-6615 [hereinafter *Policy Guidance*]. EEOC noted its view, however, that the district court in this case had incorrectly granted summary judgment for respondent. See *Policy Guidance* 9 n.22; Fair Empl. Prac. Manual (BNA) at 405:6618 n.22 ("[T]he district court purported to apply the *Hayes*/*Wright* analysis. It concluded, on summary judgment that the exclusionary policy was justified, despite the fact that, as we understand it, there was conflicting evidence about harm mediated through men. In the Commission's view, when conflicting evidence exists, summary judgment is not appropriate.").

Applying this business necessity defense, the court then concluded that (1) there was no genuine issue of material fact on the substantial health risk factor because the parties agreed that there was a substantial health risk to an unborn child from lead exposure; (2) unlike the evidence of risk to the unborn resulting from the mother's exposure, petitioners' evidence of risk to the unborn from a father's exposure was "speculative and unconvincing" (Pet. App. 34a); and (3) petitioners had waived the issue of less discriminatory alternatives by not adequately presenting it to the court of appeals. On the last point, the court also concluded that, in any event, petitioners had not produced evidence of less discriminatory alternatives in the district court. *Id.* at 32a-41a.

Having concluded that the business necessity defense was the appropriate framework and that respondent satisfied that standard, the court went on to discuss the BFOQ defense and concluded that respondent also met that test. Pet. App. 42a-59a. The en banc majority concluded that industrial safety is part of the essence of respondent's business, and that the fetal protection policy is reasonably necessary to further that concern. Quoting from *Dothard* v. *Rawlinson*, 433 U.S. 321, 335 (1977), the majority emphasized that, in view of the goal of protecting the unborn, "more is at stake" than simply an individual woman's decision to weigh and accept the risks of employment. Pet. App. 51a.

b. Judges Cudahy and Posner dissented and would have reversed and remanded for trial. Judge Cudahy explained that "[i]t may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try. * * * [T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking. However, the employer must demonstrate 'a factual basis for believing that all or substantially all women would be unable to perform safely [i.e., without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved.' " Pet. App. 60a & n.1. He regarded a trial as necessary because "substantial factual questions remain concern-

ing whether occupational exposure to lead presents a substantial risk to the fetus, whether this risk is transmitted only through the pregnant woman and whether less restrictive alternatives would adequately safeguard the employer's interest in fetal health and safety." *Ibid.*

Judge Posner similarly emphasized that, under Title VII, a fetal protection policy which explicitly applies only to women can be defended only as a BFOQ. He also observed that Title VII defines the defense as a "bona fide occupational qualification reasonably necessary to the normal operation" of a business, and that "the 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties." Pet. App. 62a, 65a. He emphasized, however, that whether a particular policy is lawful is a question of fact that should ordinarily be resolved at trial, and cited a variety of factual questions not susceptible to resolution on the current state of this record. *Id.* at 70a-74a. Like Judge Cudahy, he stressed that he viewed it "a mistake to suppose that we can decide this case once and for all on so meager a record." *Id* at 61a.

c. Judge Easterbrook, in a dissent joined by Judge Flaum, concluded that BFOQ is the proper mode of analysis, but that a fetal protection policy cannot be justified as a BFOQ. Judge Easterbrook noted that BFOQ is the appropriate framework because respondent explicitly "uses sex as a ground of decision." Pet. App. 75a. He then concluded that the BFOQ defense was not available because respondent's stated concern for the health of the unborn was irrelevant to the "operation of [its] business" under the BFOQ; similarly, he viewed the employer's concern as irrelevant to a woman's "ability or inability to work" under the Pregnancy Discrimination Act's amendment to Title VII. *Id.* at 81a.[6]

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[6] The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)) amended Title VII to provide, in pertinent part:

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work * * *.

Judge Easterbrook also stressed what he considered the excessive breadth of respondent's policy—it applies to all women (except those with medical proof of incapacity to bear children) despite the fact that most women in an industrial labor force do not become pregnant, that most of those who do become pregnant will have blood lead levels under 30 micrograms per deciliter, and that most of those who become pregnant with levels exceeding 30 micrograms per deciliter will nonetheless bear normal children. Pet. App. 83a-84a. As a result, "[c]oncerns about a tiny minority of women cannot set the standard by which all are judged." *Id.* at 84a.

Finally, Judge Easterbrook concluded that, if the business necessity defense rather than BFOQ is the governing standard, summary judgement was inappropriate, and the case should be remanded for trial. In an extensive discussion of the evidence, he found material factual disputes on all three of the factors addressed by the majority—whether there was a substantial risk to fetuses from lead in the mother's blood at the levels to which respondent exposes its employees (Pet. App. 88a-95a); whether harm to offspring comes only from exposure of the mother (*id.* at 95a-97a); and whether there were less discriminatory alternatives (*id.* at 97a-99a). He also emphasized that respondent's evidence was contradicted, not only by petitioners' evidence, but also by findings of the Occupational Safety and Health Administration (OHSA). In 1978, OSHA concluded that "both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy" and that "[g]iven the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." *Id.* at 93a (quoting 43 Fed. Reg. 52,966 (1978)).[7]

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[7] On January 24, 1990, EEOC issued a Policy Guidance on the en banc decision. The Commission modified its prior view that the business necessity defense could apply to a fetal protection policy. See note 5, *supra*. In its 1988 Policy Guidance, the Commission had emphasized that, consistent with the analysis in *Wright* and *Hayes*, the burden of proving business necessity was on the employer. *Policy Guidance* at 4-5 (1988); Fair Empl. Prac. Manual (BNA) at 405:6615. In its 1990 *Policy Guidance*, the Commission noted that it

SUMMARY OF ARGUMENT

1. Respondent's fetal protection policy explicitly excludes women from certain employment positions on the basis of their sex. The policy is not a facially neutral policy with a "disparate impact" on women. Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Rather, it is facially discriminatory, and thus represents overt discrimination and disparate treatment under Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a). See *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978); *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 (1977).

Such an explicitly discriminatory policy is not necessarily illegal under Title VII, but may be justified under that statute only if it is a "bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." § 703(e)(1), 42 U.S.C. 2000e-2(e)(1). The court of appeals incorrectly applied the business necessity defense developed in "disparate impact" cases, with its corresponding burden of persuasion on employees. *Wards Cove*, 109 S. Ct. at 2125-2126. The BFOQ defense is the appropriate standard for evaluating respondent's defense of such a facially discriminatory policy, and the burden rests on respondent to justify the policy

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had not contemplated "the Seventh Circuit's application of the *Wards Cove* business necessity standard" and the imposition of the burden on the plaintiff to disprove business necessity; "[f]or the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." Pet. App. 132a-133a. The Commission observed that the "application of *Wards Cove* to a facially discriminatory policy has convinced the Commission that the hybrid approach to fetal protection cases is problematic" and that "we now think BFOQ is the better approach." *Id.* at 134a. The Commission rejected the view, however, that the BFOQ defense is not available to defend a fetal protection policy, and set forth the elements which it believes should govern such a defense. The Commission also stated that, in its view, this case presented conflicting issues of material fact, quoting Judge Cudahy's statement that the "painful complexities are manifestly unsuited for summary judgment." *Id.* at 139a. The Commission emphasized that "Commission investigators should not overlook or dismiss conflicting evidence on the basis of the Seventh Circuit decision." *Ibid.* See also *Johnson Controls* v. *California FEHC*, 52 Fair Empl. Prac. Cas (BNA) 585 (Cal. Ct. App. 1990) (holding respondent's fetal protection policy invalid under state fair employment law).

as a valid BFOQ. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414-415, 421-423 (1985).

2. It is possible that a bona fide occupational qualification defense can be used to sustain a sex-based fetal protection policy, but an employer defending such a policy must carry its burden of justification. The language of the BFOQ provision—"reasonably necessary to the normal operation of that particular business or enterprise"—is not in terms limited to concerns regarding an employee's effect on product quality. A concern with direct harm to third parties from the manufacturing process is "reasonably necessary to the normal operation of [a] business." Indeed, in other contexts, this Court has recognized the validity of safety-related concerns in applying BFOQ analysis. See, *e.g.*, *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 412-417; *Dothard* v. *Rawlinson*, 433 U.S. at 336. A contrary conclusion that a BFOQ defense could never consider harm to third parties from the manufacturing process would render invalid any gender-based fetal protection policy, and would mean that employers could not exclude *pregnant* women from particular kinds of employment, even if there was absolute certainty of harm to the fetus from exposure to a toxic substance in the course of employment.

To justify a gender-based fetal protection policy, however, an employer must prove with specificity that such a policy is "reasonably necessary." This Court has outlined the elements of a satisfactory showing by an employer that a facially discriminatory policy is a valid BFOQ. Under the standard explicated in *Criswell*, the employer must show that the claimed hazard from worker exposure is reasonably necessary to the normal operation of its business, and that the discriminatory policy is reasonably necessary to the operation of the particular business because it is a valid "proxy" for safety-related job qualifications and employment procedures. Thus, the employer must prove that the claimed hazard is genuine; that the substance or process causing the hazard is reasonably necessary to the employer's business; and that worker exposure to the substance or process causing the hazard is also reasonably necessary. Additionally, to establish that the policy of distinguishing among employees on the basis of sex is a valid "proxy" to address legitimate safety concerns, the employer must prove that exposure of male em-

ployees to the claimed hazard does not create a similar degree of risk to offspring; that all or substantially all of the excluded class cannot perform the job safely or that individualized consideration is impossible or highly impractical; and that there are no reasonably available, less discriminatory alternatives. Because the BFOQ is a limited exception to Title VII's general prohibition on sex-based classifications, careful judicial attention to factual findings and disputes is essential.

3. The court of appeals misapplied the elements of the BFOQ standard. The court failed to consider, under the BFOQ standard with the burden properly imposed on respondent, the evidence of possible harm to offspring from the exposure of male employees. Establishing that exposure of men does not pose a similar degree of risk as exposure of women is vitally important because, in the absence of such a showing, the exclusion of fertile women cannot be a valid method for serving the employer's asserted interest in preventing direct harm to third parties from the manufacturing process. In view of this error, and in view of the importance of careful attention to factual findings and disputes, the judgment should be reversed, and the case remanded to the court of appeals for reconsideration in light of a clarified standard.

ARGUMENT

I. THE ONLY AVAILABLE DEFENSE TO A SEX-BASED, FACIALLY DISCRIMINATORY EMPLOYMENT POLICY IS THE STATUTORY BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

A. The exclusion of fertile women from specified jobs constitutes sex-based discrimination

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) prohibits sex-based classifications in the terms and conditions of employment, in hiring and discharge decisions, and in other employment decisions that adversely affect an employee's status.[8] Respondent's explicit policy of excluding

[8] Section 703(a) provides:

It shall be an unlawful employment practice for an employer –

"women with childbearing capacity" from lead-exposed jobs creates a facial classification based on gender. Respondent's policy is not a facially neutral policy that simply has a "disparate impact" on women. Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (disparate impact claim may be raised against "practices that are fair in form, but discriminatory in operation"); *Wards Cove*, 109 S. Ct. at 2118-2119 (same). Rather, it explicitly uses sex as the basis for its classification and exclusion. It is thus an overt form of "disparate treatment" because it "treats some people less favorably than others because of their * * * sex." *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). See also *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (requirement that female employees pay more than male employees to pension fund is facial discrimination because it "shows 'treatment of a person in a manner which but for that person's sex would be different' "); *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 (1977) (exclusion of women as prison guards represents "overt discrimination").[9]

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[9] Because the policy by its terms discriminates on the basis of sex, there is no need to undertake the allocation of proof suggested by cases such as *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); the terms of the policy itself establish that sex, rather than a "legitimate, nondiscriminatory reason" (*McDonnell Douglas*, 411 U.S. at 802) is the criterion for exclusion. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (*McDonnell Douglas* test inapplicable because employer's policy "is discriminatory on its face"). See also Pet. App. 80a (Easterbrook, J., dissenting) ("Our case does not concern the order of proof and methods of inference; [respondent] expressly uses sex to make decisions."). The fact that the asserted reason for the sex-based exclusion (concern for the health of the fetus) may be benign does not prevent the policy from being sex-based discrimination. See pp. 13-14, *infra*.

The policy's classification on the basis of gender and childbearing capacity, rather than gender alone, unquestionably remains sex discrimination. As an initial matter, the policy is discriminatory because it requires only female employees to produce proof that they are not capable of reproducing. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (policy of excluding only women with pre-school-age children was sex discrimination because the policy established "one hiring policy for women and another for men—each having pre-school-age children"). Additionally, in the Pregnancy Discrimination Act (PDA), Congress explicitly provided that, for purposes of Title VII, discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." § 701(k), 42 U.S.C. 2000e(k). See note 6, *supra*. "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 684 (1983). In its use of "childbearing capacity" as the criterion for exclusion, respondent explicitly classifies on the basis of potential for pregnancy; under the Pregnancy Discrimination Act, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. See Pet. App. 65a (Posner, J., dissenting); *id.* at 75a-76a (Easterbrook, Jr., dissenting).[10]

B. The only available defense to explicit, gender-based discrimination is the statutory BFOQ defense

The only statutory defense to explicit, facial discrimination under Title VII is the BFOQ defense in Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1). This statutory exemption provides that it

[10] The legislative history of the Pregnancy Discrimination Act contains repeated references to the problem of discrimination resulting from employers' perceptions that women may become pregnant. See, e.g., H.R. Rep. No. 948, 95th Cong., 2d Sess. 6-7 (1978) ("Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the childbearing age, she is viewed by employers as potentially pregnant."); 123 Cong. Rec. 21,435 (1978) (statement of sponsor Rep. Hawkins) ("many of the disadvantages imposed on women are predicated upon their capacity to become pregnant").

is not unlawful to use sex, religion, or national origin as a basis for employment decisions if that otherwise prohibited criterion "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). See note 3, *supra*. In decisions addressing the permissibility of explicit, sex-based discrimination, this Court has considered only the possible availability of the BFOQ defense. See *Dothard* v. *Rawlinson*, 433 U.S. at 332-337; *Phillips* v. *Martin Marietta Corp.*, 400 U.S. at 544. A conclusion that only the BFOQ defense is available to justify explicit, facial discrimination reflects the statutory structure: explicit, facial discrimination represents an unlawful employment practice under Section 703(a) of Title VII (note 8, *supra*), and may be justified only by the explicit statutory authorization provided in Section 703(e) (note 3, *supra*).

The business necessity defense, in contrast, developed not as a defense to explicit facial discrimination, but rather as an element to be considered in the context of a disparate *impact* claim. "Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of * * * a *disparate impact case*, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove*, 109 S. Ct. at 2125-2126 (emphasis added). See also *Griggs*, 401 U.S. at 431. This business necessity test has not, however, been employed in cases of disparate *treatment*.

Despite the explicit, facial discrimination in respondent's fetal protection policy, the court below concluded that the "business necessity defense" explicated in *Wards Cove* was the appropriate standard for evaluating the policy. Pet. App. 28a-30a. The court emphasized that this business necessity defense was appropriate because respondent's gender-based fetal protection policy was not instituted with the purpose of discriminating against women. See *id.* at 23a & n.25 (citing Fourth Circuit's conclusion that "a fetal protection policy involves motivations and consequences most closely resembling a disparate impact case" and noting that respondent's "primary interest in this case is

protecting the development and health of female employees and their unborn children").[11] The absence of a discriminatory motive, however, does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. The question whether an employment practice involves disparate treatment through explicit, facial discrimination does not depend on the nature of the employer's motive for adopting the practice, but rather on the explicit terms of the practice. In *Martin Marietta*, for instance, a possible benign motive did not prevent a conclusion that the exclusion of women with pre-school-age children constituted discrimination under Section 703(a), nor did it lead to consideration of a business necessity defense; the dispositive question became whether a BFOQ defense under Section 703(e) could justify the discrimination. 400 U.S. at 543. See also *Connecticut* v. *Teal*, 457 U.S. 440, 455 (1982) (discussing *Martin Marietta*). Similarly, in *Dothard*, the safety concerns underlying exclusion of women as prison guards did not prevent the policy from being sex discrimination under Section 703(a), nor did it lead to consideration of a business necessity defense; again, the question became whether the explicit, facial discrimination could be justified as a BFOQ under Section 703(e). 433 U.S. at 332-333. In sum, the beneficence of an employer's purpose does not undermine the conclusion that an explicitly gender-based policy is sex discrimination under Section 703(a), and may thus be defended only as a BFOQ under Section 703(e).

The Seventh Circuit's application of the business necessity doctrine rather than the statutory BFOQ defense to the facially discriminatory fetal protection policy has important consequences. The elements of the business necessity and BFOQ standards differ in significant respects. Compare, *e.g.*, *Wards Cove*, 109 S. Ct. at 2126 (standard for business necessity defense in disparate impact case) with *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412-417 (1985) (standard for BFOQ in context of age discrimination claim).[12] Most fundamentally, the burden of persuasion in the two standards is different. In *Wards Cove*, this Court explained that the burden of persuasion remains on the plaintiff at all times in a disparate impact/business necessity case. 109 S. Ct. at 2125-2126. Applying this standard here, the Seventh Circuit imposed the burden on petitioners. Pet. App. 32a-41a. The burden of establishing a BFOQ defense, in contrast, rests on the employer. See *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1789 (1989) (plurality opinion) (in BFOQ analysis, "it is the employer who must show why it must use gender as a criterion in employment"); *id.* at 1811 (Kennedy, J., dissenting) ("In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it."); *Dothard*, 433 U.S. at 332-337. See also *Crisweli*, 472 U.S. at 414-415, 422-423 (BFOQ burden of proof on employer under the ADEA).

The court of appeals thus erred in applying a business necessity defense to explicit facial discrimination and in imposing the burden on petitioners; the only appropriate defense to explicit facial discrimination under Title VII is a BFOQ defense, and the burden of establishing such a defense is on respondent.

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[11] See also *Wright*, 697 F.2d at 1186 (application of business necessity defense appropriate because of principle that "disproportionate consequences of an employment practice, even if unintended or indeed benignly motivated, may, like intentional invidiously discriminatory employer actions, constitute violations of Title VII"); *Hayes* 726 F.2d at 1548 (employer can show that gender-based fetal protection policy is "neutral" if "it effectively and equally protects the offspring of all employees").

[12] Similar standards govern the BFOQ provisions in Title VII and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* See *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 412-417 (noting that, in adopting a BFOQ in the ADEA, Congress "borrow[ed] a concept and statutory language from Title VII of the Civil Rights Act of 1964" and approving BFOQ defense for ADEA derived from Title VII precedents). See also *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (Title VII interpretation "applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII' ") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)).

II. IT IS POSSIBLE FOR A SEX-BASED, FETAL PROTECTION POLICY TO BE JUSTIFIED AS A BFOQ

A. Nothing in the language or scope of the BFOQ provision precludes its use to defend a fetal protection policy

The BFOQ defense provides a limited exception to Title VII's prohibition of sex discrimination. As this Court explained in *Dothard*, "the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission" establish that "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." 433 U.S. at 334. See also 29 C.F.R. 1604.2(a) (EEOC Guidelines on Discrimination Because of Sex) (BFOQ should be narrowly interpreted).

Despite the narrow scope of the BFOQ exception, there is no legal or logical impediment to its application in this context. It cannot be doubted that a concern with industrial safety—and with the direct harm caused by a manufacturing process or product—is appropriately an essential element of business operations. A broad variety of societal sanctions—ranging from statutes and regulations to tort liability, and from administrative fines to criminal penalties—reflect the importance of this concern.[13]

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[13] See, *e.g.*, 15 U.S.C. 2601 *et seq.* (Toxic Substances Control Act); 29 U.S.C. 651 *et seq.* (Occupational Safety and Health Act of 1970); 42 U.S.C. 6901 *et seq.* (Resource Conservation and Recovery Act of 1976); 42 U.S.C. 6901 *et seq.* (Comprehensive Environmental Response, Compensation and Liability Act of 1980). See generally W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* §§ 4, 31, 75, 95 (5th ed. 1984); *Midlantic National Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 505-506 (1986); *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971); *Morissette* v. *United States*, 342 U.S. 246, 253-254 (1952); *United States* v. *Dotterweich*, 320 U.S. 277, 280 (1943).

Legally imposed concern for harm to third parties includes harm to fetuses. See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *supra*, § 55 at 368 (every State currently allows children born alive to recover in tort for prenatal injuries inflicted by third parties); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 646 & n.24 (1981) (courts will hold unenforceable contracts between an employee and employer waiving an unborn child's cause of action against the employer). There has been no determination that federal or state law immunizes employers for injury to fetuses caused by workplace conditions, or that state tort liability for harm to fetuses is preempted by Title VII. Cf. *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) (invalidating State's sex-specific protective labor legislation under Title VII). The existence of a reasonably perceived legal obligation is distinct from a justification resting solely on economic concerns (cf. *Manhart*, 435 U.S. at 716-717), or solely on moral concerns (cf. Pet. App. 82a (Easterbrook, J., dissenting)). It is not necessary in this case to consider whether the latter categories of concern, standing alone, might justify a BFOQ defense.

The statutory language of the BFOQ exception fully supports the conclusion that a concern with direct harm to third parties from a manufacturing process may be analyzed under the framework of the BFOQ. The statute provides that an employer may show that the challenged practice is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). A concern with direct harm to third parties from the manufacturing process fits comfortably within the scope of an element "reasonably necessary to the normal operation of [a] particular business or enterprise." As Judge Posner emphasized (Pet. App. 64a), the language of the statutory provision is not framed in absolutes; the BFOQ provision refers to a practice that is "reasonably necessary" (not absolutely necessary) and to the "normal operation" of the business (not an unusual or exceptional operation of the business). Nothing in the language or limited scope of the exception requires a view that a concern for direct harm to third parties from the manufacturing process must be deemed inherently incapable of being "reasonably necessary" to the "normal operation" of a business. On the contrary, the BFOQ exception reflects "Congress' unwillingness to require employers to change the very nature of their operations in response to the statute." *Price Waterhouse* v. *Hopkins*, 109 S. Ct. at 1786 (plurality opinion).[14]

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[14] We note that this case involves a claim of harm to third parties, not a claim that the policy is necessary to protect the women themselves. Cf. *Dothard*, 433 U.S. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

In our view, the contention that a BFOQ defense is absolutely unavailable for a sex-based fetal protection policy thus reflects a misreading of the BFOQ provision of Title VII. Judge Easterbrook suggests that, in this context, the BFOQ provision relates only to the "ability to make batteries." Pet. App. 81a. Because harm to a fetus does not affect a woman's ability to make a battery, the argument goes, the BFOQ defense is unavailable.[15] The problem with this analysis is that it requires an unduly restricted view of the BFOQ provision—one which is not supported by the language of the statute. Contrary to Judge Easterbrook's analysis, that language is not limited to concerns about an employee's effect on product quality. The language of the provision has a broader scope—it refers to a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Although a concern for direct harm to third parties from the manufacturing process may not relate to the effectiveness of an employee's job performance in the sense of effect on product quality, such a concern logically relates to the "normal operation" of a business.[16] Society can and does shut down businesses that inflict harm on third parties thro[u]gh their operations; a concern with the safety of third partie[s] thus unquestionably "reasonably necessary to the normal operation of [a] particular business or enterprise."

The importance of safety to third parties, moreover, has been recognized as an appropriate element of the BFOQ analysis in

[15] The Fourth and Eleventh Circuits also assumed that the BFOQ analysis would be unavailable to defend a sex-based fetal protection policy. See *Wright*, 697 F.2d at 1185 n.21; *Hayes*, 726 F.2d at 1549.

[16] See Pet. App. 60a n.1 (Cudahy, J., dissenting) ("[T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking."); *id.* at 64a (Posner, J., dissenting) ("The words " '*normal* operation' * * * should dispel concern that consideration of all interests other than the employer's interest in selling a quality product at the lowest possible price is precluded. It is possible to make batteries without considering the possible consequences for people who might be injured if the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal.").

prior decisions. In *Dothard* v. *Rawlinson*, *supra*, for instance, this Court upheld, as a BFOQ, the exclusion of women as security guards in a particularly violent, all-male maximum security prison, in part because "[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." 433 U.S. at 336. Similarly, in *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. at 412-417, this Court upheld consideration of safety to passengers as an element in the BFOQ analysis of an age limit on flight engineers. According to Judge Easterbrook's analysis, a case such as *Criswell* can be distinguished because the concern about the safety to passengers is related to the individual's ability to "do the job." Pet. App. 85a. Again, however, there is no persuasive reason, under the explicit language of the BFOQ provision, why the concern for injuries to third parties may not include a concern for injuries to third parties resulting directly from the manufacturing process as an aspect of the "normal operation" of the business. Judge Easterbrook observes that respondent "is not using sex to avert harm *to customers*" (*ibid.* (emphasis added)), but he fails to point to language in the BFOQ provision suggesting that "normal operation of business" concerns may only be customer-directed.

In addition to lacking support in the statutory language and logical scope of the provision, the view that the BFOQ defense is completely unavailable for a sex-based fetal protection policy leads to harsh and incongruous results. A necessary consequence of that view is that, even if there is absolute certainty that a *pregnant* woman's exposure to a hazardous substance would unalterably injure the fetus, an employer is barred by Title VII from adopting a policy of exclusion focused only on pregnant women. The difference between the exclusion of fertile women and the exclusion of pregnant women is a question of the scope of the policy; if the BFOQ defense is unavailable at all to defend a sex-based fetal protection policy, then it is equally unavailable, under Title VII as amended by the Pregnancy Discrimination Act, to defend a policy directed only at pregnant

women.[17] Nothing in the language or purpose of the BFOQ requires this result.[18]

B. An employer bears a rigorous burden in justifying use of a sex-based, fetal protection policy

The standards for the BFOQ defense in the context of a fetal protection policy can be readily derived from this Court's explication of the BFOQ standard in other contexts. Application of the standards in this context suggests that the employer's burden is exacting, and that the defense must be supported by specific factual showings.

As an initial matter, and as has been discussed, it is critically important that the employer bear the burden of proof in establishing this BFOQ defense. The BFOQ defense is a limited exception provided by Title VII to its general prohibition of sex-

[17] Cf. Pet. App. 64a (Posner, J., dissenting) ("To confine the occupational qualification defense to concerns with price and product quality would deny a defense to [respondent] even if the company excluded only pregnant women, as distinct from all women who might become pregnant, from making batteries.").

[18] Because a BFOQ defense under Section 703(e) can include concern for harm to third parties from direct exposure to the manufacturing process, moreover, Judge Easterbrook's Pregnancy Discrimination Act (§ 701(k)) objection (Pet. App. 82a, 85a) is also met. The structure and language of Section 701(k) – including its definition of pregnancy-based discrimination as sex discrimination for purposes of Title VII and its provision that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work" – require that pregnancy-based discrimination be treated like other forms of sex discrimination in Title VII; like other forms of sex discrimination, pregnancy-based discrimination is thus subject to the general BFOQ defense. Nothing in Section 701(k) suggests a special exemption from Section 703(e); indeed, the language of the provision suggests exactly the contrary because, within the context of Title VII, it puts pregnancy-based discrimination on the same footing as other forms of sex discrimination. The applicability of Section 703(e) to pregnancy as a form of sex discrimination within the context of Title VII's provisions is, of course, distinct from the issue of the permissibility of state statutes according special benefits to pregnancy. Cf. *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987) (upholding state law pregnancy leave provision).

based discrimination, and, as such, the burden must be borne by the employer asserting the exception. See pp. 14-15, *supra*.

The statute provides a defense to an employer who shows that its facially discriminatory policy is "a bona fide occupational qualification reasonably necessary to the normal operation of [its] particular business or enterprise." 42 U.S.C. 2000e-2(e)(1). In the context of a safety-related BFOQ defense to a claim of age discrimination from the exclusion of flight engineers over the age of 60, this Court in *Criswell* parsed this language as posing two basic inquiries: (1) whether the objective served by the policy is "reasonably *necessary* to the normal operation of the particular business," as opposed to being "peripheral to the central mission of the employer's business," [19] and (2) whether the discriminatory aspect of the qualification is itself reasonably necessary, as opposed to being merely "convenient" or "reasonable" – *i.e.*, is the employer "compelled to rely on [the discriminatory factor] as a proxy for the safety-related job qualifications validated in the first inquiry." 472 U.S. at 413-414. This "proxy" factor, in turn, could be established if the employer proved either that it had a factual basis for believing that "all or substantially all [persons in the excluded category] would be unable to perform safely and efficiently the duties of the job involved" or that "it is impossible or highly impractical to deal with the [excluded] employees on an individualized basis." *Id.* at 414 (internal quotation marks omitted).

This standard should be applied to the context of fetal protection policies. First, the employer must establish that avoidance of the claimed hazard is "reasonably *necessary* to the normal operation of the particular business." *Criswell*, 472 U.S. at 413.

[19] The Court in *Criswell* also quoted the Fifth Circuit's statement in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (1976), that the qualification invoked by the employer "must be *reasonably necessary* to the essence of his business." 472 U.S. at 413 (emphasis in Fifth Circuit opinion). The *Criswell* Court further noted the Fifth Circuit's decision in *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, cert. denied, 404 U.S. 950 (1971), holding that a female-only qualification for flight attendants, defended on the grounds that "the airline's passengers preferred the 'pleasant environment' and the 'cosmetic effect' provided by female attendants," was not a valid BFOQ because it was " 'tangential to the essence of the business involved.' " 472 U.S. at 413 n.18.

In this context, the employer thus must establish that the claimed hazard is, in fact, a genuine hazard—that worker exposure to the claimed hazard leads to a substantial risk of injury to the fetus. The employer must also establish that the substance or process causing the claimed hazard is itself reasonably necessary to the normal operation of its business. Finally, the employer must establish that exposure to the claimed hazard is also reasonably necessary to the normal operation of its business.

Second, the employer must establish that the policy is reasonably necessary to the particular business because the employer is compelled to rely on the discriminatory criterion as a "proxy" for safety-related qualifications and procedures that would avoid the claimed hazard. As an initial matter, it is essential that the employer establish that the exposure of male employees to the claimed hazard does not present a similar degree of risk of harm to offspring; if exposure of men does lead to a similar degree of risk, the exclusion of women cannot be a valid "proxy" for addressing the asserted safety concerns. As in *Criswell*, the employer must also establish either that "all or substantially all" of the excluded group cannot perform the job without jeopardizing the safety of the fetus, or that it is "impossible or highly impractical" to assess safety on an individualized basis.[20] Finally, the employer must prove that the policy it has adopted eliminates the risk while excluding the narrowest possible group of employees, and that there are no reasonably available, less discriminatory alternatives.

These particularized inquiries are essential to assure that fetal protection policies are narrowly tailored to accomplish legitimate goals without sacrificing the rights of individuals to be free from discrimination. "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. * * * Even a true generalization about the class is an insufficient rea-

[20] It is likely that, in justifying fetal protection policies, the impossibility-of-individual-assessment claim will be more pertinent than the all-or-substantially-all-cannot-perform claim. Unless the employer has a factual basis for believing that (1) all or substantially all of the excluded women will bear children and (2) harm will be transmitted to the fetus through all or substantially all of the excluded women, the all-or-substantially-all claim will be unavailing.

son for disqualifying an individual to whom the generalization does not apply." *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978). "Practices that classify employees in terms of religion, race, or sex, tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Id.* at 709. To assure that an exclusionary policy is accepted only with a rigorous justification, and to assure that the narrowest possible group is affected by such an exclusionary policy, an employer thus must prove the specific correlation between the identified hazard and the basis for exclusion.

As a result, the importance of careful factual findings must also be emphasized. Title VII cases are, of course, subject to the same rules of procedure and practice as other areas of civil litigation. *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983); *id.* at 718 (Blackmun, J., concurring). Nevertheless, the emphasis which Judges Cudahy and Posner placed on the importance of factual findings in this area (and the emphasis which Judge Easterbrook placed on the importance of factual findings in his alternative argument (Pet. App. 88a-99a)) is entirely appropriate. The BFOQ analysis of sex-based, fetal protection policies is a "novel and difficult" area in which "careful examination of the facts as developed by the full adversary process of a trial" is likely to be particularly important. Pet. App. 73a (Posner, J., dissenting). This emphasis on the importance of factual findings is fully consistent with concerns expressed by this Court in other BFOQ cases. See, *e.g.*, *Criswell*, 472 U.S. at 423 (employer's argument concerning its experts' conclusions "virtually ignores the function of the trier of fact in evaluating conflicting testimony"); *Johnson* v. *Mayor & City Council of Baltimore*, 472 U.S. 353, 362 (1985) (BFOQ in age discrimination context requires a "particularized, factual showing"); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (employer's BFOQ justification was a "matter of evidence" and "[s]ummary judgment was therefore improper"). Such concerns are particularly salient in the sensitive area of fetal protection policies.

III. THE COURT OF APPEALS MISAPPLIED THE BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

Although the court of appeals upheld respondent's gender-based fetal protection policy on the alternative ground that it satisfied the BFOQ standard (Pet. App. 42a-59a), the court misapplied the elements of that defense. The most glaring error—and an error of sufficient magnitude to require reversal—is that the court of appeals failed to consider, under the BFOQ standard and with the burden on respondent, petitioners' evidence of harm to offspring from the exposure of males.[21] As has been discussed, a showing that a similar degree of risk is not created by the exposure of men is central to an employer's BFOQ defense, and to the validity of the use of the sex-based criterion as a proxy for individualized consideration.[22]

The court of appeals did consider petitioners' proffered evidence regarding the effects of exposure of men, but it did so only in the context of its principal holding that petitioners had failed to carry *their* burden with regard to the business necessity defense. Pet. App. 33a-36a.[23] The court first noted that respondent's experts "testified that a male worker's exposure to lead at levels within the 50 [microgram/deciliter] maximum set forth in OSHA's current (1978) lead exposure guidelines did not pose a substantial risk of genetically transmitted harm from the male to the unborn child." Pet. App. 33a. The court then observed that petitioners' witnesses "posited that animal studies had demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure" (*id.* at 33a-34a), but that petitioners had not "presented any medical evidence in the record of any human study scientifically documenting genetic defects in human beings resulting from male lead exposure" (*ibid.*), and that their experts' research was "at best, speculative and unconvincing." *Ibid.*

In rejecting the significance of petitioners' evidence, the court repeatedly emphasized that, under its application of "the Title VII disparate impact/business necessity proof scheme" (Pet. App. 34a), petitioners bore the burden of persuasion. *Id.* at 29a, 31a, 34a-35a. The court thus mistakenly considered the evidence of exposure to men under the business necessity defense, with the burden placed on petitioners.[24]

In its alternative holding that respondent had satisfied the BFOQ, the court then failed to consider, under that standard

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[21] We note that the dissenting Judges concluded that, in addition to conflicting evidence regarding the consequences from the exposure of men, the record also contains material conflicts and gaps regarding the nature of the risk to the fetus and the possibility of less discriminatory alternatives, including improved warnings, alternative employment opportunities, individualized monitoring, and increased emphasis on industrial hygiene, employee education, and respirators. See Pet. App. 60a n.1 (Cudahy, J., dissenting); *id.* at 70a-73a (Posner, J., dissenting); *id.* at 88a-95a, 97a-99a (Easterbrook, J., dissenting). We take no position on whether these issues have been properly presented or preserved in this litigation or in the petition (cf. Resp. in Opp. 19-25; Pet. Reply Br. 3-9), but we emphasize that these are precisely the kinds of issues which are vitally important for evaluating the validity of a gender-based fetal protection policy, and which require careful, precise factual findings. See pp. 22-23, *supra*.

We note also that OSHA concluded in promulgating its occupational lead exposure standard in 1978 that, in light of the evidence before it, there was "no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52,966. Instead, OSHA emphasized the use of various protective measures. *Id.* at 54,423. OSHA's 1978 conclusions, while not dispositive of the issues in this case, nevertheless represent important evidence in this type of litigation.

[22] It would, of course, not invalidate respondent's policy if exposure of men to lead created some risk to offspring, but the risk was substantially more attenuated than the risk posed by exposure of women to the same hazard.

[23] Petitioners had submitted evidence in support of their argument that exposure of men to lead also created potential hazards for offspring. See Pet. App. 95a (Easterbrook, J., dissenting) ("Three affidavits in the record, and papers in medical journals, maintain that lead in the blood creates risks for offspring of both male and female employees."). See also J.A. 261 (Silverstein Aff.) ("On the basis of the animal and human data, damage to the male can include malformed and dysfunctional sperm, chromosomal damage and aberrations and testicular damage. Defects in reproductive functions that are associated with lead exposure include fetal death * * *, sterility, low birth weight, birth defects as well as developmental abnormalities in offspring. Some of these risks can be associated with blood lead levels in males and females as low as 20 micrograms * * *"); J.A. 249 (Legator Dep.) ("There are very few chemicals that we know of * * * where there is evidence that would indicate the exposure to the male has an effect on spermatogenesis which can then be transmitted to the progeny * * * and lead falls into this group that has an effect as far as we now know from the literature, on spermatogenesis.").

[24] To the extent that the court of appeals' decision may be read as holding that animal studies are never probative (Pet. App. 34a), we disagree. The reliance on well-conducted animal studies in establishing mandatory health standards, and by analogy in evaluating the validity of exclusionary fetal protection policies, is proper. See *Industrial Union Dep't* v. *American Petroleum Institute*, 448 U.S. 607, 657 n.64 (1980) (plurality opinion); *Public Citizen Health Research Group* v. *Tyson*, 796 F.2d 1479, 1488-1489, 1496-1497 (D.C. Cir. 1986).

and with its imposition of the burden on respondent, the evidence of the consequences from the exposure of men. Although the court appeared to recognize that the burden of establishing the BFOQ was on respondent (Pet. App. 52a-53a, 58a-59a), the court discussed only evidence that (1) exposure of *pregnant* women created a risk to fetuses (*id.* at 53a); (2) exposure of *fertile* women created a risk to fetuses (*ibid.*); (3) respondent's use of a 30 micrograms per deciliter level of lead in the blood was appropriate (*id.* at 54a); and (4) there had not been a "convincing exposition in the record of any suitable alternative" (*id* at 58a). The court simply failed to consider, under the BFOQ standard with its reallocation of the burden, the evidence concerning harm from the exposure of males.[25] This element, however, is an essential element of an employer's burden in justifying a BFOQ defense, and the court of appeals' failure to consider that evidence in light of that burden represents a fundamental error in its analysis.

Because the court of appeals failed to consider this critical element of the BFOQ defense with the burden placed on respondent to justify its policy, and because the nature of the BFOQ defense in this area requires careful attention to precise factual findings and disputes, the case should be remanded to the court of appeals for further consideration in light of a clarified standard for evaluating the defense of a sex-based fetal protection policy.

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[25] At the outset of its BFOQ discussion, the court made one reference, in the context of discussing the nature of respondent's business, to the harm posed to "the offspring of female employees." Pet. App. 48a. In light of the dispute regarding evidence of harm from exposure of males – and in light of the importance of that dispute – this conclusory reference to the "offspring of female employees" cannot substitute for a considered analysis of the evidence of effects from the exposure of men, with the burden placed properly on respondent, rather than on petitioners. Nor can the court's reference to the lack of available alternatives (*id.* at 58a) be construed as encompassing a consideration of the evidence relating to exposure of men with the burden properly on the employer; in its business necessity defense analysis (with the burden on the petitioners), the court explicitly considered the evidence of exposure of men and the possibility of less restrictive alternatives as distinct subjects. Compare *id.* at 33a-36a with *id.* at 36a-41a.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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